IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUN 09 1995

LAURIE K. LAWSON,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

Case No. 93-C-852-B

FILED

JUN - 8 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with an Order entered October 12, 1994, affirming Defendant's, Secretary of Health and Human Services, decision denying Plaintiff's claim for disability insurance benefits under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq*, judgment is entered in favor of Defendant, Secretary of Health and Human Services, and against the Plaintiff Laura K. Lawson on all claims. Costs are assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1. Each party is to bear their own attorneys fees.

DATED THIS 7 DAY OF June, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 7 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

DAVID STEINSIEK,

Plaintiff,

v.

SILO, INC., a Pennsylvania corporation, formerly a wholly-owned subsidiary of Dixon Group, P.L.C. and presently a Wholly-owned subsidiary of Fretters, Inc.; FRETTERS, INC., a foreign corporation, d/b/a "YES" (Your Electronic Store), a wholly-owned subsidiary of Fretters, Inc. and RANDY USSERY, an individual and in his capacity as Store Manager,

Defendants.

Case No. 94-C-743B

ENTERED ON DOCKET

DATE JUN 09 1995

ORDER OF DISMISSAL WITH PREJUDICE

Upon Joint Motion by the parties, this Court hereby dismisses the captioned action with prejudice.

IT IS SO ORDERED.

DATED this 7 day of June, 1995.

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 08 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

In Re: LMS HOLDING COMPANY, PETROLEUM MARKETING COMPANY, and RETAIL MARKETING COMPANY, Debtors,	
UNITED STATES OF AMERICA, Appellant,	CASE NO. 92-C-1198-B
LMS HOLDING COMPANY, PETROLEUM MARKETING COMPANY, and RETAIL MARKETING COMPANY, Appellees.	Bankruptcy Cases No. 91-3412-C, 91-3413-C, 91-3414-C, and Adv. No. 92-242-C

ENTERED ON DOCKET

DATE JUN 09 1995

O R D E R

This matter is remanded to the Bankruptcy Court of the Northern District of Oklahoma for further proceedings consistent with the Court of Appeals of the Tenth Circuit's Judgment entered April 4, 1995.

The essence of said judgment derives from the Appellate Court's opinion, page 11:

> "Consistent with LMS Holding Co., we here hold that the government's tax lien remained perfected in the assets transferred to RMC from the MAKO bankruptcy, but that property acquired by RMS after the transfer would not be subject to the tax lien because the IRS did not refile against RMS."

IT IS SO ORDERED this 8th day of June, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

14

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
411 UNITED STATES COURTHOUSE
333 W Fourth Street
TULSA, OKLAHOMA 74103-3819

RICHARD M. LAWRENCE
CLERK

(918) 581-7796
(FAX) 581-7756

June 9, 1995

Ms. Dorothy Evans, Clerk
U.S. Bankruptcy Court
111 W. 5th Street
Grantson Building
Tulsa, OK 74103

IN RE: 92cv1198-B
USA v
LMS Holding

Dear Ms. Evans:

Final disposition having been made of the above case, we are herewith returning the Record on Appeal that was filed in the case, and is no longer needed.

Very truly yours,

RICHARD M. LAWRENCE

By
P Wells, Deputy Clerk

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 08 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

In Re: LMS HOLDING COMPANY, PETROLEUM MARKETING COMPANY, and RETAIL MARKETING COMPANY, Debtors,	
UNITED STATES OF AMERICA, Appellant,	CASE NO. 92-C-1198-B
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IT IS SO ORDERED this 8th day of June, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
411 UNITED STATES COURTHOUSE
333 W Fourth Street
TULSA, OKLAHOMA 74103-3819

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USA v
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Very truly yours,

RICHARD M. LAWRENCE

By
P Wells, Deputy Clerk

Enclosure

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PRODUCERS OIL COMPANY and
CHARLES GOODALL REVOCABLE TRUST,

Plaintiffs,

vs.

PHOENIX ASSURANCE COMPANY OF
NEW YORK, HARTFORD FIRE
INSURANCE COMPANY,
ALBANY INSURANCE COMPANY,
FEDERAL INSURANCE COMPANY, and
UNDERWRITERS AT LLOYD'S, LONDON,

Defendants.

Case No. 93-CV-431-H

ORDER OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT UNDERWRITERS AT LLOYD'S, LONDON ONLY

On this 8TH day of JUNE, 1995 the Application of the Plaintiffs, Producers Oil Company and Charles Goodall Revocable Trust, and the Defendant, Underwriters at Lloyd's, London, for dismissal with prejudice comes on before the Court. The Court being fully advised in the premises Orders, Adjudges and Decrees that the above-styled and numbered cause of action should be and hereby is dismissed with prejudice against Underwriters at Lloyd's, London only.

IT IS SO ORDERED.

S/ SVEN ERIK HOLMES

HONORABLE SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JERRY D. BUTLER,

Plaintiff,

vs.

WALDO F. BALES,

Defendant.

Case No. 95-C-316H

ORDER OF DISMISSAL

Pursuant to the Motion to Dismiss filed herein which the Court has reviewed and approves, it is hereby ORDERED that this matter be and it is hereby DISMISSED with prejudice.

Done this 8TH day of JUNE, 1995.

S/ SVEN ERIK HOLMES
United States District Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 1995, a true and correct copy of the above and foregoing instrument was mailed to Waldo F. Bales, Attorney, P.O. Box 1140, Jay, Oklahoma, 74346, with all postage thereon prepaid.

Jerry Butler

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICIA WILLOUGHBY,

Plaintiff,

vs.

RESOLUTION TRUST CORPORATION, an agency of the United States Government and ALBERT V. CASEY, President and Chief Executive Officer of the Resolution Trust Corporation,

Defendant.

No. 94-C-59-K

O R D E R

Now before the Court is the Motion of Plaintiff, Patricia Willoughby, for reconsideration, or in the alternative, for a new trial on her claim of discrimination based on handicap. By Order and Judgment, dated February 16, 1995, and filed of record February 17, 1995, this Court granted the Defendant's motion for summary judgment against the Plaintiff. On March 3, 1995, Plaintiff filed her motion for reconsideration or new trial.

In the Order granting summary judgment, the Court found that Plaintiff failed to provide any evidence establishing a reasonable inference that Defendants' articulated reasons for the termination were a pretext for illegal discrimination. Shapolia v. Los Alamos National Laboratory, 992 F.2d 1033, 1039 (10th Cir. 1993). In contrast, the Defendants presented extensive evidence demonstrating that Plaintiff's work was sub-standard despite continued admonishments. The reasons given were sufficient to justify termination. No specific facts were provided by the Plaintiff to

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demonstrate a genuine issue for trial as to the essential elements of the Plaintiff's case.

In the motion for reconsideration, Plaintiff points out that she was a competent employee at the FDIC before transfer to the RTC. However, the record is clear that several co-workers at the RTC found her work to be unacceptable. Moreover, she calls "unlikely" the claim by Defendants that the RTC had begun the process of terminating her several months prior to her surgery and her actual termination. Nevertheless, the evidence clearly showed that the effort to terminate Plaintiff began as early as September of 1991, several months before RTC officials were notified of Plaintiff's need for surgery. Finally, the affidavits of Sharon Kay Manley and Melanie Thompson, who worked with Plaintiff at the FDIC, do not support Plaintiff's argument. In fact, the affidavits indicate that Plaintiff's job performance was occasionally poor even before the transfer to the RTC.

Plaintiff's arguments do not present new evidence to be considered by the Court, establish mistake of law or neglect, or provide any other basis for the Court to alter its previous judgment. See Fed.R.Civ.P. 60(b); Fed.R.Civ.P. 59(e).[1] Plaintiff's supplemental allegations are conclusory, unspecific, and

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[1] Plaintiff does not specify under which procedural rule she brings her motion. If the motion was filed more than ten days after the Judgment was entered, it is reviewed under Fed.R.Civ.P. 60(b). Otherwise, it is reviewed under Fed.R.Civ.P. 59(e). Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert den., 113 S.Ct. 89 (1992). Regardless of whether this Court looks to Fed.R.Civ. P. 59(e) or 60(b), the result in this case would be the same.

and insubstantial. The brief for reconsideration essentially revisits issues already properly addressed by this Court in its original Order. In addition, there has been no showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust. United States v. 31.63 Acres of Land, 840 F.2d 760, 761 (10th Cir. 1988). In light of the considerations discussed above, the Plaintiff's Motion to Reconsider, or in the Alternative, Motion for New Trial is DENIED.

ORDERED this 8 day of June, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Plaintiff	)	
v.	)	Case No. 95 C 0034K
VICKI A. WILLIAMS, et al. Defendants	)	

AGREED ORDER

The Plaintiff, State Farm Mutual Automobile Insurance Company, by counsel, and the Defendant, Radiology Associates, Inc., by counsel, having moved, the Court being advised that Radiology Associates, Inc. filed an Answer and Disclaimer of Any Interest in Insurance Proceeds on February 15, 1995, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that all claims against the Defendant, Radiology Associates, Inc. be and hereby are dismissed with prejudice.

s/ TERRY C. KERN

Hon. Terry C. Kern, Judge

Entered: 6/7/95

Copies to:

Cheryl Bisbee
Cathryn McClanahan
Charles K. Safley, M.D.
Ernest W. Smith
Harry A. Lentz, Jr.

0040119.01

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,

Plaintiff,

vs.

DENNY'S, INC.,

Defendant.

Case No. 91-C-715-C

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came before the Court for trial by jury January 17 through 30, 1995. Plaintiff asserted claims of race discrimination and retaliation. The jury considered plaintiff's claims under Title 42, United States Code, Section 1983, and returned separate verdicts in favor of the defendant as to each claim. Simultaneously for nonjury consideration, the Court considered plaintiff's claims under Title 42, United States Codes, Section 2000e, Title VII of the 1964 Civil Rights Act.

The scope of the Court's consideration of the evidence is from 1981, when plaintiff first expressed to Denny's his interest in being promoted to management, through November 1991, the effective date of the amendment to Title VII.

Plaintiff, an African-American citizen, alleges that from the onset of his employment with Denny's in 1978, he performed at all times as an employee capable of being promoted to a position in management. Plaintiff asserts that he first expressed a desire to be promoted to management in 1981, and that he continued to request promotion until his employment with

Denny's ended in 1993. Plaintiff asserts that he demonstrated the ability and willingness to be a manager. Plaintiff asserts that non-African-American employees with fewer qualifications and experience were promoted to management.

In 1986, plaintiff filed a complaint of race discrimination with the Oklahoma Human Rights Commission. Plaintiff asserts that after he filed his complaint, despite his qualifications, the defendant retaliated against him by refusing to promote him into management.

In response, Denny's denies discriminating against the plaintiff in any manner. Denny's contends that its managers interviewed and evaluated plaintiff's qualifications for a management position on several occasions, but that plaintiff did not demonstrate the skills, knowledge and ability to be promoted. Denny's offered plaintiff the opportunity to participate in a preparatory management program. Denny's contends that plaintiff showed little interest in the program and failed to complete it. Denny's denies that plaintiff was a qualified candidate for management and denies retaliating against the plaintiff. Denny's also denies that race was a factor in its decision not to promote the plaintiff.

After consideration of the pleadings, testimony and exhibits admitted at trial, the briefs and arguments presented by counsel, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Jurisdiction and Venue

1. Plaintiff Ronald K. Thomas is a male African-American citizen of the United States, a resident of Tulsa, Oklahoma, and this judicial district.

2. Defendant Denny's is a California Corporation doing business in the State of Oklahoma.

3. Denny's was at all times pertinent to this action engaged in an industry affecting commerce with fifteen or more employees for each of twenty or more calendar weeks in the current or proceeding calendar year.

4. During his employment with Denny's, plaintiff worked at various restaurants located in the Tulsa area which are owned and operated by Denny's.

5. Plaintiff timely filed charges of race discrimination with the Oklahoma Human Rights Commission which were transferred to the Equal Employment Opportunity Commission (EEOC).

6. In 1990, the EEOC issued a "no-cause" determination, concluding that Denny's had not discriminated against the plaintiff. In 1991, the EEOC dismissed plaintiff's complaint and issued a Notice of Right to Sue. Plaintiff filed another complaint with the EEOC in 1993, and subsequently amended his complaint. Plaintiff's second complaint, as amended, was dismissed by the EEOC.

7. Plaintiff timely filed the action herein.

B. Background

8. In 1978, at the age of seventeen, plaintiff was hired by Denny's as a service assistant (dishwasher/busboy).

9. Plaintiff graduated from high school in 1979, and was promoted by Denny's to the position of cook.

10. Directly after high school plaintiff attended Spartan School of Aeronautics, a vocational/technical school, while working part time as a cook at Denny's. In 1980, plaintiff discontinued his education at Spartan without receiving a degree and worked full time for Denny's. Plaintiff's job performance as a cook was good and he became a "cook trainer" for Denny's new employees.

11. At plaintiff's request in 1981, plaintiff was interviewed by Terry Lee, a district manager with Denny's, for possible promotion to management.

12. In 1982, plaintiff spoke to James Carney, a general manager with Denny's, regarding his desire to be promoted to management.

13. In 1984, plaintiff completed an application and was formally interviewed by Michael Kearney, a general manager, for a management position. Plaintiff was interviewed approximately ten times between 1981 and 1993 for promotion into management.

14. In 1985, Denny's offered plaintiff the opportunity to participate in the Preparatory Management Program, (the "PMP"). The PMP is a self-motivated program designed to aid individuals who are interested in a management position and a mechanism used by management to assess an individual's potential skills as a manager. Although there is no predetermined time in which to complete the program, those who successfully completed the program could be offered entry into the Management Training Program (MIT). Employers with prior restaurant experience or with prior college training qualified for direct participation in the MIT program.

15. Richard Clemons, an assistant manager at Denny's, reviewed the requirements of the PMP packet with plaintiff. Plaintiff failed to appear at several meetings which were scheduled by Mr. Clemons as part of the program. After approximately eight weeks of effort,

plaintiff dropped the PMP without completing its requirements. Plaintiff did not make a dedicated effort to complete the PMP.

16. Irene Johnson, a unit manager who was fond of the plaintiff, provided him the opportunity to work as a unit aid. A unit aid functions in a quasi-management position overseeing the restaurant activities and filling in for any absent restaurant employee. Ms. Johnson considered plaintiff a good employee and recommended him to the district manager for participation in the MIT.

17. In his performance reviews by management from 1978 through 1992, plaintiff received average to below standard ratings through the mid-1980's. In the late 1980's, plaintiff's ratings increased to above average although there were some intermittent below standard ratings. Plaintiff's physical appearance throughout his employment was below the standards required by Denny's.

18. Plaintiff was considered by all Denny's managers to be a good cook and a diligent worker.

19. The majority of the employees who entered and successfully completed the MIT were either college graduates, had completed relevant college courses, or had prior management experience. Plaintiff had not taken any college courses. Denny's recommended that the plaintiff attend a local college as preparatory training for promotion, but plaintiff did not follow through with the recommendation. Plaintiff failed to show any incentive to take the necessary steps which would lead to a managerial position.

20. There is no indication that plaintiff worked in a racially hostile environment. The evidence was undisputed that plaintiff was well liked by his co-workers, and there was an absence of any racial slurs directed toward the plaintiff or other African-American employees.

21. Although a few of Denny's local managers recommended plaintiff for participation in the MIT, there was no evidence that plaintiff had the requisite management experience or college education necessary to qualify him for the MIT program or direct promotion into management.

22. The district managers, general managers, and the personnel manager who interviewed plaintiff unanimously testified that plaintiff lacked the requisite communication skills, professional presence, business ability, and initiative to enter the MIT or be promoted to an assistant manager or manager. It was recommended that plaintiff enroll in some business courses to acquire skills in business management including accounting, marketing and management discipline. Again, plaintiff failed to take the required initiative to qualify for the position he sought.

23. The evidence established that there were several white employees who were offered participation in a preparatory management training program, but they failed to complete the program and accordingly were not considered for management. There was also evidence that several white assistant managers were not promoted to manager. A bona fide employment qualification was the determining factor used by upper management for selection of employees for promotion to a unit manager. There is a complete absence of evidence that race played any part in Denny's promotion policy.

24. Denny's promoted Imogene Warren and Andy Goodwin into management. Both of these employees are African-American. Imogene Warren had taken bookkeeping and accounting courses prior to joining Denny's. Andy Goodwin started at Denny's as a cook and qualified for the management program. Denny's also offered a management position to John Meaus, an African-American male, but he declined the offer in order to complete his college education.

25. There was no evidence to indicate that plaintiff was retaliated against by Denny's for having filed a race discrimination complaint with the Oklahoma Human Rights Commission in 1986. Both prior to and after filing the complaint, plaintiff lacked the necessary qualifications for participation in the MIT or for promotion into management, and plaintiff lacked the fortitude to obtain the training or education which would have qualified him for a management position.

26. Plaintiff had little knowledge of the restaurant industry, business ability or management skills even though he was considered to be a good cook, a good employee and had been employed with Denny's since 1979.

27. Plaintiff was interviewed in 1986 by Debbie Reynolds (the district manager), Ken Agorichas (the human resource manager), and Jaimie Cullinan (a general manager). Collectively these managers concluded that plaintiff lacked the initiative, commitment, education and ability to qualify for a management position. The Court finds that this conclusion is supported by the evidence.

28. At his request, in 1992, plaintiff was again interviewed by Denny's for a management position. Plaintiff had not completed the PMP package or enrolled in any college courses. Throughout the course of his employment, plaintiff failed to act upon the suggestions

of management to qualify for participation in the MIT program. Plaintiff's request for promotion was again denied in 1992. On February 13, 1993, plaintiff voluntarily resigned his position as a cook with Denny's.

CONCLUSIONS OF LAW

A. Jurisdiction and Venue

1. All filing requirements of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e)-(5)(e) which are prerequisites to the jurisdiction of this Court have been satisfied by the plaintiff.

2. The defendant is an employer within the meaning of 42 U.S.C. §2000e-(b).

B. Nonliability of Defendant Denny's

3. Denny's did not commit unlawful acts of race discrimination or retaliation against the plaintiff by its failure to promote plaintiff into management.

4. In order to establish a prima facie case of race discrimination by failure to promote, plaintiff must show by a preponderance of the evidence each of the following essential elements: (1) that he is a member of the class protected by the statute; (2) that he applied and was qualified for an available position in management; (3) despite his qualifications, he was rejected by defendant's failure to promote him; and (4) after he was rejected the defendant continued to seek applicants for positions in management, and that the defendant filled the management positions with non-African American employees. See, Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1469 (10th Cir.1992) and St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

5. The Court concludes that plaintiff did not establish his prima facie case of race discrimination by a preponderance of the evidence. First, the evidence established that the plaintiff was not qualified to either participate in the MIT program or be promoted into management. Plaintiff lacked the initiative to complete the PMP package which would have positioned him to commence the MIT program. Neither did plaintiff take relevant college preparatory classes to acquire a basic understanding of business and finance.

6. The Court concludes that those individuals who were invited to participate in the MIT program and were advanced to management had either (1) prior management experience in the industry, (2) had completed several college preparatory course, or (3) had obtained a college decree. Rudimentary educational skills were necessary prerequisites for participation and completion of the MIT program. Plaintiff lacked both the initiative and ability to complete even the PMP package which indicated his lack of readiness for the MIT program and a management position.

7. Second, plaintiff failed to establish by a preponderance of the evidence that Denny's failed to promote qualified African-Americans into management or allow them participation in the MIT program. The evidence established that Denny's promoted qualified African-Americans to management.

8. In order to establish a prima facie case of retaliation, plaintiff must show: (1) protected opposition to discrimination; (2) adverse action by an employer contemporaneous with or subsequent to the employee's protected activity; and (3) a causal connection between such activity and the employer's action. Purrington v. University of Utah, 996 F.2d 1025, 1033 (10th Cir.1993).

9. In order to meet this burden, plaintiff must show "a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions." Id.

10. Plaintiff failed to establish a "causal connection" between his filing a charge of race discrimination and Denny's decision not to promote him to management and/or not to offer him participation in the MIT program. The Court concludes that the defendant's failure to promote plaintiff into management was unrelated to plaintiff filing a charge of race discrimination. The evidence established that there was no difference in the manner in which the defendant treated the plaintiff regarding its decision not to promote him to management either prior to or after plaintiff filed the complaint with the Oklahoma Human Rights Commission. Thus, plaintiff failed to establish a causal connection evidencing retaliation.

11. Plaintiff failed to show that Denny's engaged in any discriminatory or differential treatment which would support a claim of race discrimination or retaliation.

Based on the evidence presented, the Court concludes that the plaintiff, Ronald K. Thomas, has failed to establish either his prima facie case of race discrimination or retaliation. Accordingly, the Court finds in favor of the defendant Denny's, Inc. on plaintiff's claims under Title 42, United States Code, Section 2000e, Title VII of the 1964 Civil Rights Act.

IT IS SO ORDERED this 7th day of June, 1995.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,

Plaintiff,

vs.

DENNY'S, INC.,

Defendant.

Case No. 91-C-715-C

ORDER

Before the Court for consideration is defendant's motion for attorney fees. Defendant seeks attorney fees as prevailing party under plaintiff's claims for race discrimination and retaliation brought pursuant to Title 42, United States Code, Section 1983 and Title 42, United States Code, Section 2000e of the 1964 Civil Rights Act.

In Christiansburg Garment Company v. EEOC, 434 U.S. 412 (1978), the court held that a trial court within its discretion may deny an award of attorney fees to a prevailing defendant, in a civil rights action, unless it is shown that the plaintiff's actions were frivolous, unreasonable, or without foundation.

Although the Court dismissed as factually unsupportable several of plaintiff's claims prior to and during the course of trial, there were sufficient controverted material facts on the issues of race discrimination and retaliation which would require submission of these claims to the jury for determination. Thus, the Court finds and concludes that plaintiff brought this action in a good faith belief that his claims had merit.

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Accordingly, it is the order of the Court that the motion of the defendant for attorney fees as against the plaintiff is DENIED.

IT IS SO ORDERED this 7th day of June, 1995.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 7 - 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,

Plaintiff,

vs.

DENNY'S, INC.,

Defendant.

Case No. 91-C-715-C

ENTERED ON DOCKET
DATE 6-8-95

JUDGMENT

This matter came before the Court for non-jury trial on plaintiff's claims brought pursuant to Title 42, United States Code, Section 2000e. The issue having been duly considered and a decision having been rendered in accordance with the Findings of Fact and Conclusions of Law filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant, Denny's, Inc., and against plaintiff, Ronald K. Thomas.

IT IS SO ORDERED this 7th day of June, 1995.

H. DALE COOK
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KAREN F. BRADLEY aka Karen Faye Bradley; CHARLES E. BRADLEY aka Charles Edward Bradley; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 420K

ORDER

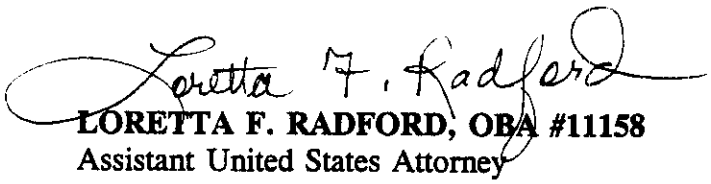
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 6 day of June, 1995.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CECIL E. SOURIE; SHELOR D. SOURIE; STANDARD FEDERAL SAVINGS BANK; ITT FINANCIAL SERVICES, INC. COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED JUN 07 1995 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA Civil Case No. 95-C 212K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7 day of June, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Cecil E. Sourie, Shelor D. Sourie, Standard Federal Savings Bank, and ITT Financial Services, Inc.**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Cecil E. Sourie**, waived service of Summons on March 31, 1995; that the Defendant, **Shelor D. Sourie**, waived service of Summons on March 31, 1994; that the Defendant, **Standard Federal Savings Bank**, acknowledged receipt of Summons and

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSE PRO SE LITIGANTS IMMEDIATE UPON RECEIPT.

Complaint via Certified Mail on March 9, 1995; and the Defendant, ITT Financial Services, Inc., acknowledged receipt of Summons and Complaint on March 8, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 17, 1995; and that the Defendants, **Cecil E. Sourie, Shelor D. Sourie, Standard Federal Savings Bank, and ITT Financial Services, Inc.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, Cecil E. Sourie and Shelor D. Sourie are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Nineteen (19), Block Eighteen (18), WHISPERING MEADOWS, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma.

The Court further finds that on June 12, 1987, T. Gaylon Hallsted, a single person, and Sara E. Smith, a single person, executed and delivered to Firstier Mortgage Co., their mortgage note in the amount of $59,250.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, T. Gaylon Hallsted, a single person, and Sara E. Smith, a single person, executed and delivered to Firstier Mortgage Co. a mortgage dated June 12, 1987, covering

the above-described property. Said mortgage was recorded on June 15, 1987, in Book 5030, Page 1791, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 30, 1987, Firstier Mortgage Co. assigned the above-described mortgage note and mortgage to Goldome Realty Credit Corp. This Assignment of Mortgage was recorded on August 24, 1987, in Book 5047, Page 1281, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 27, 1989, Goldome Realty Credit Corp assigned the above-described mortgage note and mortgage to Standard Federal Savings Bank. This Assignment of Mortgage was recorded on August 21, 1989, in Book 5202, Page 244, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 27, 1990, Standard Federal Savings Bank assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 6, 1990, in Book 5239, Page 1844, in the records of Tulsa County, Oklahoma; said assignment is defective however in the said Assignment did not contain a legal description of the real property being conveyed.

The Court further finds that the Defendants, Cecil E. Sourie and Shelor D. Sourie, are the current title owners of the property by virtue of a General Warranty Deed dated August 8, 1988, and recorded on August 10, 1988 in Book 5120, Page 1874, in the records of Tulsa county, Oklahoma. The Defendant, Cecil E. Sourie and Shelor D. Sourie, are the current assumptors of the subject indebtedness.

The Court further finds that on November 1, 1989, the Defendants, Cecil E. Sourie and Shelor D. Sourie, entered into an agreement with the Plaintiff lowering the

amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on September 18, 1990.

The Court further finds that the Defendants, Cecil E. Sourie and Shelor D. Sourie, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Cecil E. Sourie and Shelor D. Sourie**, are indebted to the Plaintiff in the principal sum of $87,376.11, plus interest at the rate of 9.5 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $34.00 which became a lien on the property as of June 23, 1994; a lien in the amount of $29.00 which became a lien as of June 25, 1993; and a lien in the amount of $39.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Cecil E. Sourie, Shelor D. Sourie, Standard Federal Savings Bank, and ITT Financial Services, Inc.**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Cecil E. Sourie and Shelor D. Sourie**, in the principal sum of $87,376.11, plus interest at the rate of 9.5 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.88 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $102.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Cecil E. Sourie, Shelor D. Sourie, Standard Federal Savings Bank, ITT Financial Services, Inc. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Cecil E. Sourie and Shelor D. Sourie**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States

Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $102.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 212K

LFR:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES DIXON, Plaintiff, vs. KIMBALL'S PRODUCE, INC., an Oklahoma Corporation, Defendant.	Case No. 94-C-1047K consolidated with Case No. 94-C-829K

ORDER TO DISMISS WITH PREJUDICE

NOW, on this 7 day of June, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

SO ORDERED

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Approved by:

Ronald D. Cates
Attorney for Defendant

H.I. Aston
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY ROGERS,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 93-C-859-K

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, Gary Rogers, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered ~~May~~ June 7, 1995, affirming the Secretary's decision,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant and against the Plaintiff.

IT IS SO ORDERED THIS 6 DAY OF ~~MAY~~ June, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY ROGERS,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 93-C-859-K

ORDER

Plaintiff Gary Rogers ("Rogers") seeks review under 42 U.S.C. §405(g) of the Secretary's decision, denying his application for social security disability benefits.

Rogers filed his request for benefits in November 1991, alleging disabilities arising from a back injury, fibromyositis and depression. After denial through the initial and reconsideration determinations, Plaintiff requested a hearing before an administrative law judge ("ALJ"). The ALJ found that Rogers' impairments did not prevent him from performing his past relevant work as a paper deliverer, data entry clerk, clerical worker, and assembly worker, and thus, was not disabled.

When the Appeals Council denied review, the decision of the ALJ issued on February 22, 1993 became the final decision of the Secretary. Plaintiff now seeks judicial review based on two alleged errors:

1) The ALJ erred by improperly assessing Roger's residual functional capacity; and

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2) The ALJ failed to make a proper Step 4 analysis.

Rogers has a high school education and worked in the past as a data entry clerk, clerical worker, UPS unloader and paper deliverer. The injury from which his claim arises came during his employment with The Silvey Company. Rogers was lifting a heavy metal file drawer above his head when he experienced a sharp pain in his back. Rogers testified that he is unable to work because of fibromyositis and depression which resulted from this back injury. He alleges he cannot sit more than fifteen minutes or a total of two hours, cannot stand more than twenty minutes or a total of three hours, and cannot walk more than one block, all because of sharp, throbbing back pain. Claimant has a history of hallucinations which is under control with medication. Presently, claimant takes Doxepin for his depression and eight Advil daily for pain.

DISCUSSION

Before the Court is the appeal of the plaintiff to the Secretary's denial of disability benefits.

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2 A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

In this case, the ALJ concluded at Step Four of the sequential analysis. The ALJ found that claimant has the residual functional capacity to perform work related activities, except for work involving lifting more than 20 pounds occasionally or 10 pounds frequently. Furthermore, the work could involve only occasional stooping, incidental contact with the public, with little work environment limitations, and low stress with little criticism from supervisors. The ALJ further determined that claimant's past relevant work as a paper deliverer, data entry clerk, clerical worker, and assembly worker did not require the performance of work-related activities precluded by the above limitations (Tr. 17).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The first objection raised by Rogers is that the ALJ erred by failing to consider the limiting effects of all of Rogers' impairments, including nonexertional impairments such as the side effects of medication, headaches, and mobility limitations. This allegation is not supported by the evidence in the Record. The ALJ took into account all of claimant's subjective complaints but discounted the validity of claimant's non-exertional limitations by finding the allegations of disabling pain and mental limitations not credible to the extent alleged. (Tr. 15) The ALJ gave several

reasons for his conclusions: the claimant appeared to be highly unmotivated to work; claimant was found malingering for secondary gain by the neurological consultant, Dr. Goodman; claimant's depressive symptoms seemed to be well controlled with medication; and claimant's therapist believed claimant was not motivated and was not following through with therapy. (Tr. 16). Finally, the ALJ concluded that "the medical expert found that the claimant's mental condition was under complete remission and there was only a minimal effect, if any, from medication." (Tr. 16).

Although the medical expert indicated that dryness of mouth, fatigue, sleepiness or insomnia were possible side effects from the medication, there was no indication that claimant's sleepiness was such that it would prevent claimant from working. (Tr. 64-66). Plaintiff's treating physician, Dr. Welden, indicated a review of Rogers' systems was positive for a variety of adverse symptoms, but she does not indicate that these side effects, including headaches, would preclude Rogers from performing work related activities. (Tr. 238-242). Also, a consultative neurological examination by Dr. Goodman in January 1992 did not indicate that claimant was incapacitated by side effects of his medication. Quite to the contrary, Dr. Goodman said Rogers was malingering for economic gain involving a workers' compensation claim. (Tr. 15, 233-235). Consequently, even though Rogers complains of sleepiness, his complaints are not supported by the Record and need not be accepted as credible. Generally, credibility determinations made by an ALJ such as those made in this case, are binding upon review. Talley

v. Sullivan, 908 F.2d 585 (10th Cir. 1990), citing Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988); see also Broadbent v. Harris, 609 F.2d 407, 413 (10th Cir. 1983). Even accepting Rogers' allegations about the side effects as true, "the Record contains substantial evidence to support the ALJ's decision." Casias v. Secretary of HHS, 933 F.2d 799, 801 (10th Cir. 1991).

Plaintiff also contends the ALJ failed to include in his evaluation Plaintiff's limited ability to stand, sit, and walk. A review of Dr. Welden's report shows that the claimant commented that "he can only sit for 5 to 10 minutes without increased muscle pain, can only walk for 10 minutes without quitting, and is unable to do any activities which require bending." (Tr. 239) The Tenth Circuit has held that a claimant's descriptions, alone, are not enough to establish a physical or mental impairment. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also 20 C.F.R. §404.1528(a). Even though Dr. Welden does report decreased ranges of motion, weak heel walking, positive SLR, both sitting and lying, with multiple tender points of fibromyositis and muscle spasm of the right lower back, there is no indication that these limitations were so significant to preclude Rogers from performing certain types of work. Upon request for clarification, Dr. Welden reported that Rogers did not use an assistive devise, such as a cane or crutches for ambulation, although he used objects near him to get up. (Tr. 241).

The Court also notes two aspects of Plaintiff's personal life that suggest Plaintiff could sit, stand and walk better than he has

represented. During September 1991, claimant was arrested for grand larceny and concealing stolen goods. (Tr. 64). Then in February 1992, claimant was attending Tulsa Junior College, enrolled in 9 hours, where he performed quite satisfactorily. (Tr. 254). In March 1992, a Family Mental Health Center therapist stated that Plaintiff was taking a humanities class and was doing a final report on Greek art. (Tr. 253).

Furthermore, two reviewing physicians, Dr. Fiegel and Dr. Woodcock, evaluated the claimant after a review of the complete medical record. These physicians indicated that Rogers was not precluded from performing the full range of light and sedentary work, including the sitting, standing and walking requirements of his past relevant work. (Tr. 140-145).

Pursuant to this review of the Record, this Court determines that there is substantial evidence to support the ALJ's assessment of claimant's residual functional capacity. (Tr. 17).

Lastly, Plaintiff contends the ALJ made an improper Step 4 analysis. Under Sections 404.1520(e) and 416.920(3) of the regulations, a claimant will be found "not disabled" when it is determined that he or she retains the RFC to perform:

1. The actual functional demands and job duties of a particular past relevant job; or

2. The functional demands and job duties of the occupation as generally required by employers throughout the national economy.

The ALJ secured the testimony of a vocational expert to assist in determining how Rogers' past jobs were usually performed, the transferability of his skills, and whether jobs existed in the

national economy at his light exertional level. The vocational expert testified that Rogers' past relevant work involved sedentary and light exertional abilities. (Tr. 68). In view of the previous determinations that Rogers' limitations--such as headaches, standing/sitting limitations, and medication side effects--were not of sufficient severity to preclude him from work activity, the ALJ was not bound by the hypothetical questions posed by claimant's attorney. See Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

By utilizing the relevant physical and mental restrictions substantiated by objective findings, the ALJ concluded that claimant has the residual functional capacity to perform work related activities within certain constraints. For instance, claimant cannot lift more than 20 pounds occasionally or 10 pounds frequently, can only stoop occasionally, can sustain only incidental contact with the public, needs a work atmosphere with a low stress level and little criticism from the supervisor. The claimant's past relevant work as a paper deliverer, data entry clerk, clerical worker and assembly worker did not require the performance of work-related activities precluded by these limitations. Thus, the ALJ properly found that claimant's impairments do not prevent him from performing his past relevant work. Therefore, the ALJ's determination that claimant is not disabled within the meaning of the Social Security Act is supported by substantial relevant evidence.

Based on the foregoing, this Court determines that there is

sufficient relevant evidence to support the ALJ's ruling that Rogers is able to perform his prior work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 6 DAY OF ~~MAY~~ June, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE BRAGG,

Plaintiff,

vs.

AMERICAN PIPE BENDING, INC., d/b/a AMERICAN PIPE BENDING COMPANY, an Oklahoma Corp

Defendant.

No. 94-C-575-K

JUDGMENT

In accordance with the jury verdict rendered on May 25, 1995, entered in favor of the Defendant American Pipe Bending, Inc. and against the Plaintiff, Eddie Bragg, judgment is hereby entered in favor of the Defendant on all claims.

ORDERED this 7 day of June, 1995.

PERRY C. KERN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN, OF ANDRE R. WILKINS aka Andre Robert Wilkins aka Bob Wilkins, DECEASED; MARY ELLEN WILKINS; ANDRE M. WILKINS; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma

Defendants.

CIVIL ACTION NO. 94-C-1150-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day of June, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma**, ex rel. **Oklahoma Tax Commission**, appears not having previously filed a Disclaimer; the Defendant, **Mary Ellen Wilkins**, appears not having previously filed a Disclaimer; the Defendant,

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Andre M. Wilkins, now Deceased, should be dismissed from this action; and the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins, Andre Robert Wilkins aka Bob Wilkins, Deceased; and City of Glenpool, Oklahoma**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Mary Ellen Wilkins**, signed a Waiver of Summons on December 19, 1994; that the Defendant, **State of Oklahoma, ex rel. Oklahoma Tax Commission**, was served a copy of Summons and Complaint on December 16, 1994, by Certified Mail; that the Defendant, **City of Glenpool, Oklahoma**, was served a copy of Summons and Complaint on December 16, 1994, by Certified Mail

The Court further finds that the Defendant, **Andre M. Wilkins**, is Deceased and should be dismissed from this action.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins aka Andre Robert Wilkins aka Bob Wilkins, Deceased**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 22, 1995, and continuing through March 29, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins**

aka Andre Robert Wilkins aka Bob Wilkins, Deceased, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins aka Andre Robert Wilkins aka Bob Wilkins, Deceased**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, filed their Answers on December 29, 1994; that

the Defendant, **State of Oklahoma, ex rel. Oklahoma Tax Commission**, filed its Disclaimer on May 12, 1995; that the Defendant, **Mary Ellen Wilkins**, filed her Disclaimer on January 3, 1995; and that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins aka Andre Robert Wilkins aka Bob Wilkins, Deceased; and City of Glenpool, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that **Andre R. Wilkins, Deceased** was also known as and sometimes referred to as Andre Robert Wilkins and Bob Wilkins, and will hereinafter be referred to as **"Andre R. Wilkins, Deceased."**

The Court further finds that on August 13, 1991, **Andre R. Wilkins,** filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-02931-W. On December 6, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, the case was subsequently closed on January 29, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Six (6), Block Eighteen (18), The Cinnamon Tree , an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that this is a suit brought of the further purpose of judicially determining the death of **Andre R. Wilkins** and of judicially determining the heirs of **Andre R. Wilkins**.

The Court further finds that **Andre R. Wilkins,** a single person, became the record owner of the real property involved in this action by virtue of that certain Deed dated March 16, 1990, from Jack Kemp, Secretary of Housing and Urban Development, of Washington D.C., action by and through Federal Housing Commissioner. Such Deed was filed on March 20, 1990, in Book 5242, Page 507, in the records of Tulsa County, Oklahoma.

The Court further finds that **Andre R. Wilkins** died on or about June 20, 1993, while seized and possessed of the real property being foreclosed. The Certificate of Death issued by the Oklahoma State Department of Health certifying Andre R. Wilkins' death, due to scrivener's error the Certificate Number was not included.

The Court further finds that on March 16, 1990, **Andre R. Wilkins, now deceased**, executed and delivered to Cimarron Federal Savings and Loan Association, his mortgage note in the amount of $26,157.00, payable in monthly installments, with interest thereon at the rate of Eight and Forty-Seven Hundredths percent (8.47%) per annum.

The Court further finds that as security for the payment of the above-described note, **Andre R. Wilkins, a single person, now deceased**, executed and delivered to Cimarron Federal Savings and Loan Association, a mortgage dated March 16, 1990, covering the above-described property. Said mortgage was

recorded on March 20, 1990, in Book 5242, Page 508, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 16, 1990, Cimarron Federal Savings and Loan Association, assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Assignment of Mortgage was recorded on April 26, 1990, in Book 5249, Page 678, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 8, 1992, BancOklahoma Mortgage Corp., assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, HIS SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on May 13, 1992, in Book 5404, Page 1846, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 5, 1992, **Andre R. Wilkins, now deceased**, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that **Andre R. Wilkins, now deceased**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of $31,499.47, plus interest at the rate of 8.47 percent per annum from August 1, 1994 until

judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of **Andre R. Wilkins**, and to a judicial determination of the heirs of **Andre R. Wilkins.**

The Court further finds that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $288.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $18.00 which became a lien on the property as of June 25, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins, Deceased; and City of Glenpool, Oklahoma**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Board of County Commissioners,** Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **State of Oklahoma, ex rel. Oklahoma Tax Commission, and Mary Ellen Wilkins**, disclaim any right title or interest in the subject real

property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem in the principal sum of $31,499.47, plus interest at the rate of 8.47 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.88 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of **Andre R. Wilkins** be and the same is hereby judicially determined to have occurred on or about June 20, 1993, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that despite the exercise of due diligence by Plaintiff and its counsel no known heirs of **Andre R. Wilkins, deceased**, have been discovered and it is hereby judicially determined that **Andre R. Wilkins, deceased**, has no known heirs, executors, administrators, devisees, trustees, successors and assigns, and the Court approves the Certificate of Publication and Mailing filed by

Plaintiff regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, have and recover judgment in the amount of $288.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, have and recover judgment in the amount of $18.00, plus costs and interest, for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Board of County Commissioners**, Tulsa County, Oklahoma, **State of Oklahoma, ex rel. Oklahoma Tax Commission, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Andre R. Wilkins, Deceased; and City of Glenpool, Oklahoma** have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of

said real property;

Second:

In payment of Defendant, **County Treasurer**, Tulsa County, Oklahoma, in the amount of $288.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, **County Treasurer**, Tulsa County, Oklahoma, in the amount of $18.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real

property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-1150-K

LFR:flv

Exhibit No. 2, part A

UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OKLAHOMA

ERNIE H. ANDERSON, an individual, plaintiff,

v.

TERMINIX INTERNATIONAL COMPANY, Limited Partnership, defendant.

Case No. 95-C-152-K.

STIPULATION TO DISMISS WITH PREJUDICE.

STIPULATION TO DISMISS WITH PREJUDICE.

Plaintiff, **ERNIE H. ANDERSON,** and defendant, **TERMINIX INTERNATIONAL COMPANY, LIMITED PARTNERSHIP,** hereby stipulate under Federal Rule of Civil Procedure 41 to dismissal of this action with prejudice.

Respectfully submitted,

ATTORNEY FOR PLAINTIFF ERNIE H. ANDERSON:

Thomas L. Bright, OBA # 001131
1799 East 71st Street
Tulsa, OK 74136
Phone # 918-492-0008.

Ernie H. Anderson
Plaintiff Ernie H. Anderson.

ATTORNEYS FOR DEFENDANT:

David E. Strecker, OBA #8687
Connie L. Kirkland, OBA #14262
c/o Strecker & Strecker
Petroleum Club Bldg., Suite 412
601 South Boulder
Tulsa, OK 74119
(918-582-1760);

James H. Stock, Jr.
Elizabeth A. Holloway
c/o WEINTRAUB, ROBINSON
2560 One Commerce Square
Memphis, TN 38103
(901-526-0431; fax 526-8183).

Terminix International Company, a Limited Partnership:

[Officer or Director of Terminix International Company, a Limited Partnership]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. LORI D. WILKERSON nka Lori D. Lusk; UNKNOWN SPOUSE of Lori D. Wilkerson nka Lori D. Lusk, if any; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	Civil Case No. 94-C-1147-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5th day of June, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Lori D. Wilkerson nka Lori D. Lusk, Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any and City of Glenpool, Oklahoma**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **City of Glenpool, Oklahoma**, was served a copy of Summons and Complaint on December 16, 1994.

The Court further finds that the Defendants, **Lori D. Wilkerson nka Lori D. Lusk and Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 23, 1995, and continuing through April 27, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Lori D. Wilkerson nka Lori D. Lusk and Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Lori D. Wilkerson nka Lori D. Lusk and Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer

jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, filed their Answers on December 29, 1994; and the Defendants, **Lori D. Wilkerson nka Lori D. Lusk, Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any and City of Glenpool, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, **Lori D. Wilkerson** was restored to her former name of Lori D. Lusk, in her Divorce from Randy L. Wilkerson, Case No. FD-90-05334, filed of record with the Tulsa County Clerk on June 4, 1992, in Book 5410, Pages 863-868. The Defendant, **Lori D. Wilkerson nka Lori D. Lusk,** will hereinafter be referred to as "**Lori D. Wilkerson.**"

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT FIVE (5), BLOCK FIVE (5), KENDALWOOD III, AN ADDITION TO THE CITY OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE AMENDED PLAT THEREOF.

The Court further finds that on September 16, 1988, the Defendant, **Lori D. Wilkerson** and Randy L. Wilkerson, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP their mortgage note in the amount of $37,264.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.50%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, **Lori D. Wilkerson** and Randy L. Wilkerson, then husband and wife, executed and delivered to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP, a mortgage dated September 16, 1988, covering the above-described property. Said mortgage was recorded on September 22, 1988, in Book 5129, Page 2296, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 14, 1989, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., LIMITED PARTNERSHIP, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on August 31, 1989, in Book 5204, Page 1710, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1989, the Defendant, **Lori D. Wilkerson** and Randy L. Wilkerson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between the Plaintiff and the Defendant, **Lori D. Wilkerson** on July 16, 1990, December 18, 1990, February 13, 1992, and June 3, 1992.

The Court further finds that the Defendant, **Lori D. Wilkerson**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Lori D. Wilkerson**, is indebted to the Plaintiff in the principal sum of $60,064.66, plus interest at the

rate of 10.50 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $566.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $7.00 which became a lien on the property as of June 20, 1991, a lien in the amount of $38.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $29.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Lori D. Wilkerson nka Lori D. Lusk, Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any and City of Glenpool, Oklahoma**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, **Lori D. Wilkerson**, in the principal sum of $60,064.66, plus interest at the rate of 10.50 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.85 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, have and recover judgment in the amount of $566.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, have and recover judgment in the amount of $74.00, plus costs and interest, for personal property taxes for the years 1990, 1991, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Board of County Commissioners**, Tulsa County, Oklahoma, **Lori D. Wilkerson nka Lori D. Lusk, Unknown Spouse of Lori D. Wilkerson nka Lori D. Lusk, if any, and City of Glenpool, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Lori D. Wilkerson**, to satisfy the In Rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern

District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, **County Treasurer**, Tulsa County, Oklahoma, in the amount of $566.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, **County Treasurer**, Tulsa County, Oklahoma, in the amount of $74.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any

right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

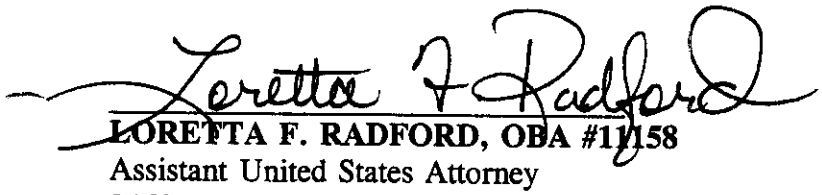
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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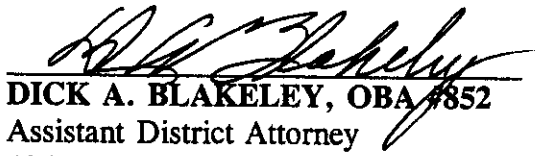
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
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(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-1147

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDOLPH JOHN AMEN,

Plaintiff,

v.

THE UNITED STATES OF AMERICA et al.

Defendants.

Case No. 95-CV-0004-H

O R D E R

At issue before the Court is whether Defendants are properly joined in this lawsuit. Rule 20(a) of the Federal Rules of Civil Procedure provides that "[a]ll persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief . . . arising out of the same transaction . . . and if any question of law or fact common to all defendants will arise in the action." (emphasis added)

In this action, Plaintiff has joined 31 Defendants and a panoply of apparently unrelated claims. The defendants include such diverse entities as the Warren Commission, the Hawaii Bar Association, the National Syndicate of the Cosa Nostra, Niagara County Social Services, Santa Monica College, Williamson Van and Storage, the County of Dallas, and Basel Pharmaceuticals. At a status conference held on May 26, 1995, Plaintiff conceded that no question of law or fact common to all Defendants will arise in this action and that, therefore, the requirements of Rule 20 of the Federal Rules of Civil Procedure were not satisfied.

Rule 21 of the Federal Rules of Civil Procedure provides that "[p]arties may be dropped or added by order of the court on motion

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of any party or of its own initiative at any stage of the action. . . ." Accordingly, the Court hereby dismisses all Defendants from this lawsuit, without prejudice, except for the first named Defendant, the United States of America.

IT IS SO ORDERED.

This 4TH day of JUNE, 1995.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMMYE JO VANN,

Plaintiff,

v.

FIRST DATA RESOURCES, INC.,

Defendant.

Case No. 94-CV-1175-H

O R D E R

This matter comes before the Court on an Application for Dismissal by Plaintiff Sammye Jo Vann. Plaintiff states she has not served Defendant First Data Resources, Inc. with the Complaint and requests the Court to dismiss this action with prejudice. Plaintiff's request is granted. This action is hereby dismissed with prejudice.

IT IS SO ORDERED.

This 4TH day of JUNE, 1995.

Sven Erik Holmes
United States District Judge

(3)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 5 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

KELLEE JO BEARD, et al.,

Plaintiffs,

vs.

No. 87-C-704-E

THE HISSOM MEMORIAL CENTER, et al.,

Defendants.

ENTERED ON DOCKET
DATE JUN - 5 1995

O R D E R

Now before the Court is the Plaintiffs' Motion for Order Requiring payment *Pendente Lite* (Docket #327) and Plaintiffs' Motion and Authority to Reconsider (Docket #337).

In this matter, Plaintiffs', as prevailing parties, applied for, and were granted, their attorneys' fees. On appeal, the Tenth Circuit rejected the hourly rate of Louis Bullock and held that he should receive the prevailing market rate of $125 per hour, and also that the judgment should be modified to eliminate all hours spent on the Paulson due process. Plaintiffs sought to set aside the resulting judgment, asserting that the conclusion that the prevailing market rate is $125 per hour is based solely on the false testimony of Lana Tyree, and is therefore erroneous. This Court rejected this attempt, and Plaintiffs now seek reconsideration of that issue.

While these issues were pending, Plaintiffs sought payment *pendente lite*, asking that they be awarded the undisputed amount of fees in the amount of $86,227.62, because the motion for reconsideration and the issue of fees on the Paulson matter could take some time to resolve. Plaintiffs now concede the that the

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fees on the Paulson matter can be determined without a hearing.

1) Fees on Paulson due process:

The Tenth Circuit ruled that the Plaintiffs were not entitled to fees for the Paulson due process. The matter that remains to be determined is the number of hours by which the fee award should be reduced. Plaintiffs claim that 38.75 hours were spent on that matter and Defendants claim that 52.75 hours were spent. Both sides claim that their number was formed from a review of the fee applications. Neither number is immediately evident from a review of those applications, and the problem is caused, at least in part, by Plaintiffs' counsel's time records which record one time for multiple tasks performed.

The Court further notes that the affidavit which supports Plaintiffs' number, when compared to the fee application appears to omit several entries pertinent to the Paulson matter. Reviewing the fee application (and particularly the entries omitted by the affidavit of Louis Bullock), the affidavit of Louis Bullock and the testimony of Defendants' expert, the Court concludes that 44 hours were spent on the Paulson due process and should be deducted from the total fee award.

2) Motion to Reconsider

Plaintiffs filed a Motion to Set Aside the Judgment under Rule 60(b)(6), Fed.R.Civ.P., and in the Alternative to Reopen the Case Under Rule 59(a), Fed.R.Civ.P., or to Alter or Amend the Judgment Under Rule 59(e), Fed.R.Civ.P., Based on the False Testimony of Lana Tyree. After reviewing the authority submitted by both sides

and the record of Ms. Tyree's testimony in both this proceeding and the one submitted by Plaintiffs, the Court concluded that there was no basis for disregarding the testimony of Lana Tyree and that the record supported the determination that $125 is the prevailing market rate for the types of services performed in this case by Plaintiffs' counsel. In their Motion to Reconsider, Plaintiffs' do not present any additional authority or factual support for their position. Plaintiffs' Motion to Reconsider is denied.

Conclusion

Forty-four hours were spent on the Paulson due process and should be deducted from the total fee award. The hourly fee is $125 in accordance with the Order of the Court of Appeals, and Plaintiffs' Motion and Authority to Reconsider (Docket #337) is denied. Thus, the total amount to which Plaintiffs are entitled is $87,321.37. In light of this Order, the Motion for Order Requiring payment *Pendente Lite* (Docket #327) is denied as moot. The parties are directed to submit an agreed judgment within 15 days.

So ORDERED this 5th day of June, 1995.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHADWICK ROBERT MATLOCK,

Petitioner,

vs.

MICHEAL W. CARR, et al.,

Respondents.

No. 94-C-986-K

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of Tulsa County District Court in Case Nos. CF-92-766, CF-92-1122, and CF-92-1161. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below, the Court concludes that the petition for a writ of habeas corpus should be denied.

I. BACKGROUND

On June 15, 1992, after the State amended each of the six counts in Case Nos. CF-92-766, CF-92-1122, and CF-92-1161 from robbery with firearms to robbery by fear, Petitioner pleaded guilty to all counts, and in accordance with the plea agreement received a sentence of eight years in each case to be served consecutively. Petitioner did not seek to withdraw his guilty pleas or otherwise appeal his convictions within the applicable time period, although the trial judge specifically advised him of his right to file a

motion to withdraw his guilty pleas and then file a certiorari appeal.

On September 20, 1993, Petitioner filed an application for post-conviction relief seeking an appeal out of time. He alleged that the trial court failed to properly advise him of his right to appointed counsel on appeal and the right to "a case made at public expense" if indigent, citing Copenhaver v. State, 431 P.2d 669 (Okla. Crim. App. 1967), and that the trial court did not advise him of the consequences of his guilty pleas, including the minimum and maximum punishments, citing King v. State, 553 P.2d 529 (Okla. Crim. App. 1976). Petitioner further alleged that he was denied the effective assistance of counsel during the ten-day period for filing a notice of appeal.

On December 17, 1993, the Tulsa County District Court denied relief, finding that counsel acted as a reasonably competent attorney. (Ex. B at 2, attached to Respondent's Response, docket #6.) The Court found that "[o]ther than petitioner's unsupported statements contained in his brief in support of his Application for Post-Conviction Relief, there is no indication that he ever desired to discuss the possibility of appealing his case with his attorney." (Id.) The Court further found that Petitioner's remaining grounds of error should have or could have been raised on direct appeal, and Petitioner had not offered sufficient reason for his failure to do so. The Court of Criminal Appeals affirmed on March 16, 1994. (Ex. B attached to the petition, docket #1.)

Thereafter, Petitioner filed the instant petition for writ of

habeas corpus. He alleges that he is "entitled to an appeal out of time because the trial court failed to advise him of his right to court appointed counsel and case-made at public expense if he chose to appeal." (Petition at 6.) Petitioner further alleges that the trial court "committed fundamental error when it failed to properly advise [him] of the minimum and the maximum penalties for the crimes charged" and that counsel was ineffective for failing to "visit him at the Tulsa County Jail during the ten-day period within which to withdraw his guilty plea." (Petition at 8 and 10.) In support of the latter claim, Petitioner submits an affidavit from his mother in which she attests that Petitioner asked her to contact counsel in order to discuss whether to appeal his guilty pleas, and that, although she left five messages (four by telephone and one in person), counsel never returned any of her telephone calls or attempted to contact her in any fashion. (Ex. A attached to Petition.)

Respondent argues that Petitioner is procedurally barred from raising his claims in the present petition. Petitioner does not dispute that he defaulted his claims, he argues however that the failure of the trial court and counsel to advise him of his right to appointed counsel on appeal and to an appeal free of costs constitute sufficient cause and prejudice to excuse his default.

II. ANALYSIS

As a preliminary matter, the Court determines that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c).

See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992). The Court turns next to Petitioner's claims that he was denied a right to an appeal due to ineffective assistance of counsel and due to the trial court's failure to advise him of his right to appointed counsel on appeal and the right to an appeal free of costs. The Court will address these claims on the merits as freestanding claims as well as to determine whether they present sufficient cause to excuse Petitioner's default.[1]

After reviewing the record in this case, the Court declines to review Petitioner's first claim--that the trial court failed to inform him of his right to appointed counsel on appeal and to an appeal free of cost--because it is based solely on the alleged violation of state law.[2] See Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992) (where court liberally construed the petition to assert a claim of ineffective assistance of counsel

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[1]The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 749-750 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

[2]Petitioner relies on Copenhaver v. State, 431 P.2d 669 (Okla Crim. App. 1968) and Jewel v. Tulsa County, 450 P.2d 833, 835 (Okla. Crim. App. 1967). (Petitioner's brief in support of application for post-conviction relief at 4-6, attached as exhibit A to Respondent's response.)

because petitioner's claim that the state court should have notified him of his right to an appeal free of cost was grounded only on Oklahoma law). It is well established that a federal habeas corpus action is concerned only with whether a federal constitutional right was violated. 28 U.S.C. § 2254. The Court, however, liberally construes the petition to allege ineffective assistance of counsel for failing to correct the trial court's misinformation and advise Petitioner of his right to court appointed counsel on appeal and to an appeal free of cost.

The standard governing Petitioner's claim of ineffective assistance of counsel is well established. Under Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Id. at 687; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A federal habeas court need not consider whether a petitioner established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, 26 F.3d 717, 718-19 (7th Cir. 1994); Lozada v. Deeds, 964 F.2d 956,

958 (9th Cir. 1992). Under Strickland, this Court must first determine whether counsel had a duty to advise Petitioner of his right to appeal. If there is no such duty, the failure to advise cannot be ineffective assistance.

Although a defendant has a right to appeal a judgment entered on a guilty plea, failure to appeal an appealable judgment does not amount to ineffective assistance of counsel per se. See Oliver v. United States, 961 F.2d 1339, 1342 (7th Cir.), cert. denied, 113 S. Ct. 469 (1992). "An attorney has no absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Castellanos, 26 F.3d 717; Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188.

The only constitutional claim asserted by Petitioner is that his retained counsel provided ineffective assistance of counsel when he failed to advise him of his right to appointed counsel on

appeal and to an appeal free of cost.[3] Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman v. Reynolds, 971 F.2d 500, 506. Therefore, counsel had no duty to advise Petitioner of his right to appeal the guilty pleas absent any evidence demonstrating that counsel knew or should have known Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188.

While counsel had a duty to inform Petitioner of his limited rights to appeal his guilty pleas if Petitioner inquired about his appeal rights, see id., Petitioner has not met this burden either. Other than the belated argument raised for the first time in his reply (that Petitioner asked his attorney to visit him at the Tulsa County Jail following sentencing), Petitioner has set forth no contention that he ever instructed his attorney to appeal or even inquired as to whether he had a right to appeal. (Reply at 3.) On the contrary, the Court notes that he acknowledged in his petition that he "never requested his court appointed counsel to file a motion to withdraw his guilty pleas and pursue an appeal." (Petition at 10.) Moreover, Petitioner agreed to begin serving his

[3]The Court notes that this claim may very well be frivolous because Petitioner was represented by a public defender free of cost during the guilty plea proceedings.

sentences immediately, although the court advised him that he could choose to remain in the county jail during the pertinent ten-day period following the entry of the Judgment and Sentence. (Sentencing Tr. at 22-23.) Accordingly, counsel had no duty to visit Petitioner at the Tulsa County Jail to discuss whether he should appeal his pleas or advise him of his right to an appeal free of cost and/or appointed counsel on appeal, and as a result his conduct did not amount to constitutionally ineffective assistance of counsel under the Sixth Amendment.

Because counsel's conduct was not ineffective, Petitioner cannot show sufficient cause to excuse his procedural default of his second ground for relief. Petitioner only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence, but contests only his counsel's failure to correct the trial court's misinformation about his appeal rights. Accordingly, this Court must conclude that Petitioner's second ground for relief is procedurally barred.

III. CONCLUSION

After carefully reviewing the record in this case, the Court finds that Petitioner's counsel provided effective assistance of counsel and therefore that Petitioner is not entitled to an out-of-time appeal. The Court also finds that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to

excuse his procedural default of his second ground for relief.

The petition for a writ of habeas corpus (docket #1) is hereby **denied**.

SO ORDERED THIS 1 day of June, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDWARD RAMON,

Plaintiff,

vs.

THE BOARD OF REGENTS OF OKLAHOMA STATE UNIVERSITY, STATE OF OKLAHOMA,

Defendant.

Case No. 94-C 746-K

ORDER

NOW on this 31 day of May, 1995, pursuant to the Joint Stipulation of Dismissal and Application for Dismissal With Prejudice of the parties hereto, the Court, being fully advised in these premises, finds that the Application should be granted.

IT IS THEREFORE ORDERED that this cause is dismissed with prejudice as to the Defendant. Each party is to bear its own costs and attorney fees.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LONNIE JAMES WHITE,

Petitioner,

vs.

R. MICHAEL CODY,

Respondent.

No. 94-C-1044-K

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of the Tulsa County District Court in Case Nos. CF-92-5355. Respondent has filed a response to which Petitioner has replied. As more fully set out below, the Court concludes that Petitioner's petition for a writ of habeas corpus should be denied.

I. BACKGROUND

On April 1, 1993, Petitioner pled guilty to Murder in the First Degree and Possession of a Firearm, After Former Conviction of a Felony, and received a life sentence and a fifteen-year sentence respectively, to be served consecutively. At the time of the plea and sentencing, Petitioner was represented by retained counsel, Jack Zanerhaft, and was advised of his right to appeal the guilty plea by filing a motion to withdraw guilty plea within ten days of sentencing.

On April 12, 1993, eleven days after sentencing, Petitioner

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filed a Motion to Withdraw Plea of Guilty.[1] On July 8, 1993, Petitioner filed a Motion for Extention [sic] of Time to file Appeal and on July 12, 1993, he filed a Petition to Appeal Out of Time. The latter two motions were apparently filed with the help of Robert Cotner, an inmate law clerk. On August 12, 1993, the Tulsa County District Court construed the motion for an extension of time as an application for post-conviction relief and denied the same. The court found that Petitioner's motion to withdraw guilty plea was untimely and that other than the self-serving statements of petitioner, there was nothing in the record to support Petitioner's claim that he was denied an appeal through no fault of his own. (Ex. D attached to Respondent's Response.) Instead of appealing the district court's decision, Petitioner filed an application for writ of mandamus which the Court of Criminal

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[1]In his reply to Respondent's response, Petitioner contends that he did not file the motion to withdraw guilty plea and has no idea who did. (Reply, docket #5, at 4.) He alleges as follows:

> He merely assumed from the state's response to his early petitions that someone from Mr. Fransein's firm [who petitioner contacted after sentencing] filed the motion. The petitioner would ask the Court to take judicial notice that (1) the signature on the motion is not petitioner's; (2) the heading on the motion shows "In the District Court of Rogers County," whereas, petitioner has never been in Rogers County and did not have any way of obtaining a petition from Rogers County while he was situated in the Tulsa County Jail; (3) the petition shows it was completed on April 12, 1993 and delivered to the Tulsa County Courthouse where it was stamped filed on the same day.

(Id. at 4-5.)

In the present petition for a writ of habeas corpus and second application for post-conviction relief, Petitioner alleged that someone from Mr. Fransein's law firm filed the motion to withdraw guilty plea. (Petition at 5a, and second application for post-conviction relief at 3, ex. G attached to Respondent's response.)

Appeals denied on October 5, 1993. (Ex. F attached to Respondent's Response.)

Thereafter, Petitioner filed a Second or Subsequent Application for Post-Conviction Relief, requesting an appeal out of time and alleging ineffective assistance of counsel. The Tulsa County District Court denied relief on the basis of res judicata, and the Court of Criminal Appeals affirmed.

In the present petition for a writ of habeas corpus, Petitioner contends that he has been denied the effective assistance of counsel during the ten-day period for perfecting an appeal. Respondent contends that Petitioner's ineffective assistance claim is procedurally barred because he failed to raise it in his first application for post-conviction relief.

II. ANALYSIS

As a preliminary matter, the Court determines that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992). The Court turns next to Respondent's argument that Petitioner is procedurally barred from asserting his ineffective assistance of counsel claim in the present petition for a writ of habeas corpus because he failed to raise it in his first application for post-conviction relief.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 749-750 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner does not dispute that he defaulted his federal claim in state court pursuant to an independent and adequate state

procedural rule when he failed to appeal properly the denial of his first application for post-conviction relief. See Okla. Stat. Ann. tit. 22, § 1087 (West 1986); Farrell v. Lane, 939 F.2d 409 (7th Cir. 1991) (petitioner defaulted claim of ineffective assistance of counsel for purposes of habeas review, even though he had raised that issue in post-conviction petition, where he had failed to appeal denial of post-conviction petition). He argues, however, that ineffective assistance of counsel in filing a direct criminal appeal and ineffective assistance by an inmate law clerk in pursuing his first application for post conviction relief are sufficient causes to excuse his procedural default. He also argues that he is semi-illiterate and totally ignorant of the law.

Petitioner's showing of cause and prejudice concerning his failure to appeal the denial of his first application for post-conviction relief is inadequate. The Court notes that Petitioner had no federal constitutional right to effective assistance of counsel at the post conviction level. See Coleman, 501 U.S. at 755-56 (no constitutional right to counsel in a state post-conviction proceeding); see also Carter v. Montgomery, 769 F.2d 1537, 1543 (11th Cir. 1985); Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990). Therefore, any failure on the part of the inmate law clerk who was assisting Petitioner with his first state post-conviction petition does not serve as cause to explain Petitioner's default. See Whiddon v. Dugger, 894 F.2d 1266, 1267 (11th Cir.) (because there is no right to legal counsel in collateral proceedings, poor advice about such proceedings from a

state provided attorney or inmate law clerk affords no basis for "cause"), cert. denied, 498 U.S. 834 (1990). Moreover, Petitioner's pro se status and lack of awareness and training of legal issues do not constitute sufficient cause under the cause and prejudice standard. Rodriguez v. Maynard, 948 F.2d 684, 688 (10th Cir. 1991).

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence, but contests only his retained counsel's failure to file a direct appeal. Accordingly, this Court must conclude that Petitioner's federal habeas claims are procedurally barred.

Even assuming Petitioner can show sufficient cause and prejudice to excuse his failure to raise his ineffective assistance of counsel claim in his first application for post-conviction relief, the Court concludes that Petitioner would not be entitled to habeas relief. Petitioner contends that he was denied an appeal through no fault of his own because of ineffective assistance of counsel during the ten-day period following sentencing, citing Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991). He alleges, for the first time in his petition for a writ of habeas corpus, that his retained counsel, Jack Zanerhaft, failed to contact him during the ten days following sentencing, although he wrote him a letter "asking that he continue his duties to represent him during the

critical ten (10) day period following trial."[2] (Reply, docket #6, at 4 and 8.) Petitioner further alleges that with the help of his mother he asked Jim Fransein, an attorney from Tulsa, to represent him on appeal. Petitioner concedes, however, that Mr. Zanerhaft may not have received the letter and that Mr. Fransein declined to represent him on appeal.[3]

To prove ineffective assistance of counsel for failing to preserve the right to a direct appeal, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 694 (1984). A federal habeas court need not consider whether a petitioner can establish prejudice under the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his

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[2]Petitioner does not have a copy of the letter he wrote to Mr. Zanerhaft.

[3]In his second application for post-conviction relief and on appeal from the denial of his second application for post-conviction relief, Petitioner merely alleged "that he attempted to reach his trial counsel, Jack Zanerhaft, for the purpose of filing the necessary paper work to preserve his right to appeal." (June 16, 1994 appeal brief, attached to Respondent's response, at 2.)

Petitioner's belated argument (raised for the first time in his reply) that the trial court failed to advise him of his right to appointed counsel on appeal and to a case made at public expense, see Copenhaver v. State, 431 P.2d 669 (Okla. Crim. App. 1967), does not state a federal claim and therefore is not cognizable in this federal habeas action. Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992).

lawyer to file an appeal and the lawyer failed to do so. See Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal); see also Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992).

Petitioner's reliance on Baker v. Kaiser, 929 F.2d 1495, is misplaced. Unlike Baker, Petitioner's conviction was obtained following a guilty plea. As a result, Petitioner's retained counsel had no absolute duty to file a motion to withdraw the guilty plea or advise Petitioner whether he had meritorious grounds for appeal. See Hardiman, 971 F.2d 500, 506 (10th Cir. 1992). Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock v. New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989); see also Briggs v. Carr, No. 94-5161, 1995 WL 250796, *4 (10th Cir. May 1, 1995) (unpublished opinion).

Petitioner has not alleged a constitutional claim of error which could result in setting aside his guilty plea.[4] See Laycock,

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[4]The only constitutional claim asserted by Petitioner is that his retained counsel provided ineffective assistance of counsel. Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his right to appeal a guilty plea arises only when "counsel either knows or should have learned

880 F.2d at 1188. Nor does Petitioner's unsupported claim that he sent Mr. Zanerhaft a letter during the ten-day period following sentencing suffice to establish that he asked counsel to appeal his guilty plea and that counsel failed to do so. Petitioner did not raise this claim until the instant petition for a writ of habeas corpus and Petitioner concedes that Mr. Zanerhaft may not have received the letter. Moreover, the fact that Petitioner tried to retain Mr. Fransein to preserve his appeal rights has no relevance to the alleged ineffective assistance of counsel provided by Mr. Zanerhaft. Lastly, Petitioner cannot dispute that he was informed by the court of his right to withdraw his guilty plea. Therefore, this Court must conclude that Petitioner cannot establish any factual basis for his ineffective assistance of counsel claim.

III. CONCLUSION

After carefully reviewing the record in this case, the Court finds that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. In the alternative, the Court finds that Petitioner's counsel provided effective assistance of counsel and therefore that Petitioner is not entitled to an out-of-time appeal.

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of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Petitioner's counsel had no duty to advise Petitioner of his right to appeal the guilty pleas absent any evidence demonstrating that counsel knew or should have known Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188. Therefore, Petitioner's counsel did not provide constitutionally ineffective assistance in failing to inform or advise Petitioner if he desired to appeal his guilty plea conviction.

The petition for a writ of habeas corpus (doc. #1) is hereby **denied**.

SO ORDERED THIS 1 day of June, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

jld

OBA #12042

FILED

JUN 01 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. DENNIS DAVIS and CATHY DAVIS, individually and as parents and natural guardians of TIM DAVIS, a minor; PAT HAVICE, individually and as parent and natural guardian of HEATHER HAVICE, a minor; and FARMERS INSURANCE COMPANY, INC. Defendants.	)	Case No. 95-C 268B

ENTERED

DATE JUN 02 1995

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and dismisses without prejudice its causes of action against the Defendants.

Respectfully submitted,

KNOWLES, KING, TAYLOR & ELLIS

By _____
DENNIS KING, OBA #5026
JEFFREY L. WILSON, OBA #12042
603 Expressway Tower
2431 East 51st Street
Tulsa, Oklahoma 74105
(918) 749-5566
FAX (918) 749-9531

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was mailed on each of the parties hereto at their respective addresses as to them or to their attorneys of record on the 1 day of June, 1995.

Todd Bej for Dennis King

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 31 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

TOMMIE S. BALL,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No: 93-C-742-W

ENTERED ON DOCKET
DATE JUN 02 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff Tommie S. Ball in accordance with this court's Order filed May 31, 1995.

Dated this 31st day of May, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOMMIE S. BALL,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-742-B

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fourth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

evaluation process.[2] He found that claimant's subjective complaints were credible only to the extent they were consistent with the residual functional capacity to perform work-related activities, except work involving more than light level work activity and/or any sustained acute verbal communication. He found that claimant's past relevant work, in the housekeeper-janitorial area, did not require the performance of work-related activities precluded by the above limitations, so she was not prevented from performing her past relevant work. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ erred in failing to find that claimant met Social Security Listing § 2.09 pertaining to loss of speech and Listing § 11.11(B) pertaining to anterior poliomyelitis.

(2) That the ALJ failed to follow the opinions of claimant's treating physicians.

(3) That the ALJ failed to consider claimant's problems with shortness of breath, hand and head tremors, arthritis in her hands, and her mental condition.

(4) That the hypothetical question propounded by the ALJ was not complete.

(5) That the ALJ erred in concluding that claimant could do her past relevant work.

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[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

It is well settled that the claimant bears the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The record shows that claimant has a severe impairment called spastic dysphonia, which causes a marked difficulty in her ability to speak and be understood. She testified at the hearing before the ALJ that she worked from 1989 through 1991 as a janitor in a rest home, but she quit the job because it was "getting so hard" for her to do the work because of difficulty breathing (TR 47). She claimed that the chemicals required to perform her job as janitor were hard on [her] throat" (TR 47). She stated that her activities now include caring for two grandchildren, cooking, and cleaning (TR 48-49). She admits she smokes six cigarettes a day (TR 50). She claims her hands and neck shake sometimes and she has arthritis in them (TR 50-51). The shaking occurs when she's tired and anxious about once or twice a month (TR 54-55). She contends she can lift about 25 pounds and can stand for 30-60 minutes before she has to rest and she sits down 5-10 times a day (TR 51, 53, 54).

The claimant's son testified that he sees his mother four to five times per week and helps her with her check writing (TR 57). He knows she has a problem with reading and writing, and that she cannot talk for more than 15 to 30 minutes (TR 57). He has seen her hands shake slightly, more when she has the grandchildren.

In 1984, claimant was diagnosed as suffering from carcinoma of the breast and underwent breast surgery (TR 241, 263, 309). She has not had further signs of cancer, but that year she began having trouble speaking (TR 309). On January 17, 1985, claimant

was seen at Oklahoma Osteopathic Hospital for problems in breathing and talking. The doctor examined her mouth and concluded:

> The examination of the oral aperture presented no gross abnormality and the nasopharyngeal wall presented no gross abnormality. An indirect examination of the larynx was performed and no abnormalities of the perilaryngeal area or the intrinsic larynx was noted. With attempt at vocalization while performing this procedure and at rest.

(TR-224-225).

The doctor was concerned there might be either polyp formation or redundancy subglottically, so an indirect examination was felt to be in order and performed. No vocal cord nodules, neoplastic or ulcer changes were found and no notable edema of the vocal cords or indication of paresis (TR 225). A direct laryngoscopy via fiberoptic rhinolaryngeal procedure was done, which revealed that the right and left piriform recesses were free of ulceration or plastic change (TR 232). No evidence of bleeding was noted (TR 232). The arytenoid, follicula, epiglottic regions, larynx, and false cord were free of lesion (TR 232). The true cords continued approximate to the midline and no nodularity of the surface, polypoid or plastic change, or ulceration was noted (TR 232). No gross mucosal hypertrophy was seen and the end of the trachea was found to be free of lesion or visible pathology (TR 232).

On August 9, 1990, claimant was seen for a voice evaluation at the request of Dr. Huey, her treating physician (TR 381-82). The evaluation showed her voice was "characterized by extreme tension with restricted airstream for speech. Vocal tract seems to close off for speech. She utilizes a low pitched vocal fry, almost a whisper. The quality is strained and range is very limited. Characteristics suggest a spastic dysphonia. Air is

expelled rapidly and audibly . . . ." (TR 381). She received therapy which resulted in "improved quality . . . marked improvement with steady progress." (TR 381). Vocal strain was reduced and quality improved significantly, resulting in " . . . a more intelligible and functional voice with less vocal abuse." (TR 381). However, after family trauma, she regressed to an almost pre-therapy pattern (TR 381). It was recommended that she return to voice therapy after the crisis was resolved and she was referred to an otolaryngologist (TR 381). Her progress in the program was seen as good (TR 382).

On October 12, 1988, a disability examiner noted that claimant had a "very severe speech problem - was almost impossible to understand. (Sounded very much like someone with a trach or artificial speech box.)" (TR 132).

Ann Weatherly, a speech therapist, reported on the therapy claimant received from August to October 1990 and concluded:

> At the time therapy was terminated at this office, she had not progressed to a functional voice. Prognosis was very guarded. Additionally, it was felt that the work environment that Tommie maintained was contributing to further deterioration of her voice. Tommie was experiencing periods of aphonia and attempts at controlled voice often resulted in abusive vocal patterns . . . . [I]t would be difficult for her to handle any working situation, at best.

(TR 321).

She was seen during 1991 by Dr. John D. Mowry, who stated that speech therapy was accomplishing "fairly good results," except in times of stress, and that other treatments, such as surgery and injections of botulinum toxin, offered less likelihood of success (TR 383).

On June 8, 1992, claimant was seen by Dr. Barbara A. Hastings, a neurologist, for

"neurological complaint of voice arrest and irregular and erratic interruption of air flow to support her voice." (TR 364). Examination revealed a fine rhythmic tremor of her head and both hands, which did not increase on movement, but otherwise normal tone and strength in her extremities, normal sensory exam, and normal reflex exam (TR 364). The doctor concluded the symptoms fit spastic dysphonia, which is not treatable with medications (TR 364). The doctor noted that the spasms could be modified by injection of Botulinum into the throat muscles, but the condition "usually gets worse with time." (TR 364). While the doctor was not a vocational expert, she concluded that: "it is unlikely that any occupation would be possible if she cannot speak. Her disease increases in situations of tension and the spasms of the throat become so bad that there is no phonation at all. I would suggest that she apply for disability and try to reduce the tension in her life. . . ." (TR 365).

On December 3, 1992, Dr. Hastings wrote that claimant had " . . . a valid disability which would prohibit her from employment of any kind because of her inability to sustain speech" (TR 394), but there were no medical tests or reports accompanying this opinion.

On August 5, 1992, Dr. Raj Crewal wrote that claimant had spastic dysphonia, tremors of her hands and head, arthritis in her neck and lumbar spine, arthritis in both wrists and hand joints, and hypertension, and therefore "she is unable to hold down a job and should be on disability." (TR 380).

The evidence does not show that claimant has established any pattern of treatment for arthritic type complaints, and a July 1, 1992, cervical and lumbar spine x-ray confirmed only minor degenerative changes of the cervical and lumbar spine and some degree of

generalized osteoporosis (TR 370). Both hip joints appeared normal (TR 370). No restrictions were placed on her exertional activities and she was not placed on any significant medication (TR 369). In her medication report dated December 1992, she stated she takes over-the-counter Advil for arthritis pain (TR 386). At the hearing she testified that she could no longer perform her work activities, because of breathlessness caused by the spastic dysphonia, not arthritic complaints (TR 47).

Dr. Terrance Grewe reported that he examined claimant on March 24, 1992 and he found no abnormalities of her joints, including swelling, heat, redness, deformity, or tenderness (TR 363). Dexterity was normal for gross and fine motion; grip was within normal limits (TR 363). No motor or sensory deficits were noted and her reflexes were within normal limits (TR 363). Dr. Grewe found no arthritic or musculoskeletal type impairment (TR 363).

The ALJ noted that the record did not disclose that the claimant has made significant complaints of, or been recommended treatment for, arthritic type complaints. (TR 30). At the hearing, she did not allege pain as a disabling impairment. The ALJ noted that in her disability supplemental interview outline completed December 1991, she made no allegation of pain-induced disability (TR 155-162). In fact, she reported that she cooks, cleans house, launders clothes, and does general housekeeping about 2 hours a day and 6 hours on Saturday (TR 159). However, it takes longer to do the housework because of her reduced energy level (TR 159). She continues to go grocery shopping, and enjoys garage sale shopping (TR 159). She does this once or twice a week for periods of 30 minutes more or less (TR 159). She stated that she reads the Bible 10 minutes per day and enjoys

a variety of television shows and country music (TR 160). She plays dominos, takes walks, and plays cards, generally every day (TR 160). She stated her physical and mental condition has weakened, she has shortness of breath, and she drools from the sides of her mouth (TR 160). Her social activities include visiting friends and relatives every day, about 5 hours more or less (TR 161). She needs transportation to attend social activities because she does not drive (TR 161). In her reconsideration disability report, dated May 15, 1992, she only reported, "my hands hurt" (TR 164). At the hearing, the ALJ noted that she did not allege hand pain as a disabling impairment (TR 30).

Claimant's first contention is that the ALJ erred in failing to find that she did not meet Social Security Listing 2.09. Under 20 C.F.R. 404.1599, Appendix 1 to Subpart P, § 2.09, "organic loss of speech due to any cause with inability to produce by any means speech which can be heard, understood, and sustained" is a listed disability. The court noted in Leigh v. Shalala, 870 F.Supp. 921, 923-924 (S.D. Iowa, 1994), that under Social Security Ruling 82-57, loss of speech is to be evaluated as follows:

> Ordinarily, when an individual's impairment prevents effective speech, the loss of function is sufficiently severe so that an allowance under Listing 2.09 is justified on the basis of medical considerations alone, unless such a finding is rebutted by work activity. To speak effectively, an individual must be able to produce speech that can be heard, understood, and sustained well enough to permit useful communication in social and vocational settings . . . . Three attributes of speech pertinent to the evaluation of speech proficiency are: (1) audibility -- the ability to speak at a level sufficient to be heard; (2) intelligibility -- the ability to articulate and to link the phonetic units of speech with sufficient accuracy to be understood; and (3) functional efficiency -- the ability to produce and sustain a serviceably fast rate of speech output over a useful period of time. When at least one of these attributes is missing, overall speech function is not considered effective. In further defining "intelligibility," the Secretary has stated that factors to consider are the frequency of any difficulties with pronunciation, the extent to which the individual is asked to repeat, and how well he or she is

> understood by strangers unaccustomed to hearing speech. In defining "functional efficiency," the evaluator should consider how long the claimant is able to sustain consecutive speech; the number of words spoken without interruption or hesitancy and whether the claimant appears fatigued and for how long.

The Leigh court concluded:

> "[t]he severe impairment of fluency and the extreme behavioral characteristics supports the contention that her functional efficiency is at best minimal and often nonexistent. This leads the court to find that one of the three essential attributes of speech is missing, and her overall speech function is not considered effective. When this is coupled with her diminished capacity for intelligibility (80%), the court finds that the plaintiff meets the regulation Listings of organic loss of speech as set out in section 2.09.

Id. at 924.

The court in Gresh v. Shalala, 1994 WL 465828 (W.D. Pa. 1994), found that a claimant's spastic dysphonia was disabling, although the problem was inconsistent and clearly psychogenic. The court noted that the ALJ's conclusion that claimant did not meet the criteria for Listing 2.09 was based on the fact that the problem was not constant and was not organic based. However, the district court pointed out the failure of a psychiatrist to arrive at a defining diagnosis other than "an involuntary muscle spasm" and the diagnosis of neurologists specializing in movement disorders of "abductor spasmodic dysphonia" as countervailing evidence of an organic loss of speech that was disabling. The court stated:

> Arguably, there is substantial evidence to support the ALJ's decision that plaintiff does not meet the criteria for Listing 2.09. However, the determination of whether substantial evidence exists is not merely a quantitative exercise. A single piece of evidence will not satisfy the substantiality test if the Secretary ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence -- particularly certain types of evidence (e.g., that offered by treating physicians) -- or if it really constitutes not evidence

> but mere conclusion . . . . The search for substantial evidence is thus a qualitative exercise without which our review of social security disability cases ceases to be merely deferential and becomes instead a sham.

Id. at 4.

The ALJ noted that, while claimant certainly has difficulty, her speech can be heard, understood, and sustained, and it is not "organic related" (TR 31).[3] No neurological impairments discussed in Section 11.00 are mentioned in any medical record as a possible cause for her speech impairment. However, speech pathologist Ann Weatherly, neurologist Barbara A. Hastings M.D., and internist Raj Crewal, M.D. each concluded she could not hold a job (TR 321, 365, 380). The ALJ concluded that the opinions of the physicians were not credible because they did not specifically take into consideration the strict requirements and standards of the Social Security Act and Regulations (TR 32). The ALJ failed to resolve the conflict created by the evidence of disability and medical opinions that claimant was unable to work. There is substantial medical evidence and testimony that claimant's speech cannot be "sustained" in vocational and social settings.

The ALJ erred in failing to find that claimant met Social Security Listing § 2.09 pertaining to loss of speech or the equivalent of the Listing at the third step of the

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[3]The ALJ's use of the phrase "organic related" suggests a failure of proof with regard to the requirements of the § 2.09 listing, which would award disability due to "organic loss of speech **due to any cause** with inability to produce by any means speech which can be heard, understood, and sustained." The only reasonable inference to be drawn from the ALJ's comment is that his definition of "organic" required some definitive medical finding of physical trauma, deformation, deterioration, or disease with respect to a particular organ before the listing could be applied. It follows, if this line of reasoning is adopted, that if Claimant's spastic dysphonia was psychogenic (as the record suggests at TR 241, 263, and 309-311), that the "organic" element of the listing is not met.

However, this reasoning is flawed, because the use of the word "organic" in the listing does not establish such a requirement. The court's deskside copy of Webster's Seventh New Collegiate Dictionary defines "organic" as "of, relating to, or arising in a bodily organ." Dr. Mowrey reported that "indirect laryngoscopy showed a very distinct spastic dysphonia with quivering of the vocal cords" confirmed with "a very characteristic type of voice associated with spastic dysphonia." There is no question but that Claimant's difficulties with speech were "organic" in nature, arising out of involuntary spasms in the larynx (TR 394).

Once the organic nature of the difficulty is ascertained, the listing provides for disability if the organic symptoms are sufficiently severe and "due to any cause." It matters not whether the cause is psychosomatic, or, as Dr. Hastings concluded, neurologic (TR 394).

sequential evaluation process. Consequently, the decision of the Secretary finding the Claimant not disabled is reversed, and this matter is remanded to the secretary for computation and payment of benefits.

Plaintiff's Motion to Set Cause for Hearing (Docket #18) is moot.

Dated this 31st day of May, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Ball.or

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NELDA L. CARTER,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No: 92-C-351-E

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed January 5, 1995.

Dated this 1st day of May, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 1 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

PAUL E. CASTOR,

Plaintiff,

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

Case No: 94-C-753-W

ENTERED ON DOCKET
DATE JUN 02 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed February 13, 1995 remanding case to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

Dated this 1st day of ~~May~~ June, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,

Plaintiff,

vs.

DENNY'S INC.,

Defendant.

Case No. 91-C-715-C

ORDER

Before the Court is plaintiff's motion for new trial filed following the January, 1995 trial by jury. The jury returned a verdict in favor of the defendant, concluding that plaintiff had failed to prove a prima facie case of race discrimination and retaliation. Asserting that the Court committed error in certain evidentiary rulings and instructions to the jury, the plaintiff raises the following four grounds in support of his motion for new trial.

1. The Court allegedly erred in failing to properly instruct the jury as to what plaintiff needed to prove in his prima facie case to establish that plaintiff was "qualified."

2. The Court allegedly erred in failing to instruct the jury that they could find for the plaintiff on the retaliation claim, even if they found against him on the racial discrimination claim.

3. The Court allegedly erred in limiting certain testimony of two of plaintiff's witnesses regarding plaintiff's qualifications for promotion to a management position.

4. The Court allegedly erred in failing to give a "mixed motive" instruction.

After careful consideration of each of plaintiff's grounds for new trial, for the following reasons the Court concludes that plaintiff's motion for new trial is without merit and is accordingly denied.

Plaintiff's Qualification Claim

As his first ground for new trial, plaintiff asserts that the Court erred in requiring plaintiff to meet the second element of his prima facie case of discrimination, "without defining exactly what plaintiff needed to do in order to establish that he was prima facie qualified". Specifically, plaintiff asserts that the Court erred in failing to instruct the jury that plaintiff only need present "credible evidence" of his qualifications rather than establishing the second element of his prima facie case by a preponderance of the evidence. Relying on Kenworthy v. Conoco, Inc., 979 F.2d 1462 (10th Cir.1992) and MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115 (10th Cir. 1991), plaintiff argues the jury should have been instructed, as a matter of law, that it was sufficient to meet the prima facie element of "qualification" by plaintiff merely stating his own opinion that he was "qualified" regardless of conflicting evidence presented by the defendant.

The Court instructed the jury that, to establish a prima facie case of failure to promote on the basis of race, a plaintiff must show: (1) that he is a member of the class protected by the statute; (2) that he applied and was qualified for an available position in management; (3) despite his qualifications, he was rejected by defendant's failure to promote him; and (4) after he was rejected the defendant continued to seek applicants for positions in management, and that the defendant filled the management positions with non-African American employees. See, Jury Instructions p.18. See also, Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1469 (10th Cir.1992). Following the Tenth Circuit's decision in Kenworthy and MacDonald, the Supreme Court decided St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993). In Hicks, the Supreme Court held that in Title VII discriminatory treatment cases, a plaintiff must *"first establish, by*

a preponderance of the evidence, a "prima facie" case. Hicks, 113 S.Ct. at 2746 (emphasis added). In reference to plaintiff's prima facie case, the Court stated that if plaintiff establishes a prima facie case a presumption arises that the employer unlawfully discriminated against the plaintiff. The Court explained,

> To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case--i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." "The defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which *if believed by the trier of fact* would support a finding that unlawful discrimination was not the cause of the employment action. (emphasis added).

Hicks, 113 S.Ct. at 2747.

Hicks sets forth the allocation of the shifting burden of productions, the presentation of proof and the ultimate burden of persuasion. In each instance a party is required to meet the respective burden by a preponderance of the evidence. The jury retains the right to determine conflicting evidence by disbelieving the evidence of either party.

The instructions to the jury in the case *sub judice*, clearly conforms to the requirement of Hicks. In the instruction on page 5, titled "Shifting Burdens -- Both Parties", the Court sets forth both the obligation of the parties regarding the production of evidence and proof. Through the instruction on page 18, titled "Essential Elements of Plaintiff's Prima Facie Case," the jury was instructed in conformity with Hicks that plaintiff must prove each element of his prima facie case by a preponderance of the evidence. The instruction titled "Qualified Applicant-Defined"

on page 19 lists *objective factors* that the jury may consider in determining whether plaintiff established that he was "qualified." A jury's consideration of objective factors for determining the contested issue of "qualification" has been approved in Burrus v. United Telephone Company, 683 F.2d 339 (10th Cir.1983). In this instance the jury apparently disbelieved plaintiff's opinion that he was qualified to be promoted to management and thus found that plaintiff failed to establish his prima facie case by a preponderance of the evidence. Plaintiff's proposition that the Court committed error in tendering these instructions is without merit.

Plaintiff's Independent Claims

As his second ground for new trial, the plaintiff asserts that the Court erred in failing to instruct the jury that they could find for the plaintiff on the retaliation claim even if they found against him on the racial discrimination claim. There is no support for plaintiff's proposition that the instructions to the jury would lead them to believe that plaintiff's separate claims for failure to promote and for retaliation were dependent claims. The Court's instructions on page 8 and 10, titled respectively, "Claims and Defenses" and "Plaintiff's Claims" indicate that plaintiff asserts two claims in violation of the Civil Rights Act. The elements of the two claims are separated on pages 18 and 20 of the instructions. Moreover, in each reference to plaintiff's claims the Court indicated that the jury's verdict could be for or against either or both of plaintiff's claims. This is illustrated on page 29, in the instructions entitled "Nondiscriminatory Reason," which reads,

> You are advised that if plaintiff Ronald Thomas establishes the essential elements of his prima facie claims of discrimination *and/or* retaliation by a preponderance of the evidence, the burden then shifts to the defendant to state a legitimate non-discriminatory reason for his actions toward plaintiff. (emphasis added).

This same alternative conclusion is illustrated in the instructions on pages 21, 23, 27, 31, 35, and 38. The Court also provided the jury with a separate verdict form for each of plaintiff's failure to promote claim and plaintiff's retaliation claim. The jury was reminded by the Court prior to retiring that plaintiff had brought two claims, and that a separate verdict form was provided for each of plaintiff's claims and that each verdict form required their consideration and unanimous verdict. Plaintiff's second proposition of error is without merit.

Plaintiff's Qualifications Witnesses

Plaintiff contends that the Court allegedly erred in limiting certain testimony of his witnesses Masood Kasim and Irene Johnson. Plaintiff first argues that the Court refused to allow these witnesses to testify as to plaintiff's qualifications for a management position. Contrary to plaintiff's contentions, both witnesses primarily testified to their observations of plaintiff's abilities and job performance. Both witnesses testified that they had recommended plaintiff for a management position.

In his reply brief, plaintiff narrows his objection by asserting that the Court erred in refusing to allow these witnesses to compare plaintiff's qualifications with those of other employees who were promoted to management. On defendant's objection, the Court limited the testimony of Masood Kasim to the subject matter listed by the plaintiff in his "Second Supplemental Final Witness List" filed immediately prior to trial. The defendant objected by asserting prejudice in allowing plaintiff to expand, without sufficient notice to the defendant, the scope of Mr. Kasim's testimony. Accordingly, in fairness to the defendant the Court limited the scope of Mr. Kasim's testimony to "the abilities and management potential of Plaintiff" as

designated and limited by plaintiff in his "Second Supplemental Final Witness List." Plaintiff's assertion that the Court committed error in this regard is meritless.

Plaintiff's assertion of error in limiting the testimony of witness Irene Johnson is vague and lacks specific reference to the record. From a review of the record the Court must assume that plaintiff is referring to one of defendant's objections, which was sustained by the Court, based on relevance. The question asked of Ms. Johnson, defendant's objection, and the Court's ruling is as follows:

Mr. Stidham: Did there come a point in time, ma'am, when you determined Mr. Thomas had the capabilities to be a management candidate?

. . . .

Mr. Hagedorn: Your honor, the problem I'm having is these people are not decision makers, policy makers with Denny's are being asked to give their opinion when in fact it doesn't make any difference, and the jury should not be allowed to hear what her and other people's opinions are about whether Mr. Thomas ought to be in management. She can talk about her efforts and what she did and what she said, but she had no part in the decision.

The Court: Yes, I know.

. . . .

Mr. Hagedorn: It's not relevant.

. . . .

Mr. Stidham: She was a training manager, sir. She trained many unit promotables and as such she was in a position to determine relative capabilities of Mr. Thomas and the non-Africans who were promoted before him.

The Court: Isn't it relevant the opinion that the people had who did the promotion? The relevance is what their opinion was, not this lady's opinion.

Mr. Stidham: There's no question she wasn't a final decision maker.

The Court: She wasn't a decision maker at all.

Mr. Stidham: Yes, she was. She made the decision on who to take to the district leader for promotion.

The Court: Is your case simply who got there for promotion and is that your question?

Mr. Stidham: No, sir.

The Court: Sustained.

The question asked by plaintiff's counsel to Ms. Johnson related to whether Mr. Thomas had the capability of being a "management candidate." At all times, Mr. Thomas believed that he was a candidate for management. The issue in the lawsuit was not whether Mr. Thomas was a candidate for management, but whether Mr. Thomas should have been promoted to management. Ms. Johnson testified that Mr. Thomas applied for and was a candidate for management. Ms. Johnson however lacked expertise in whether Mr. Thomas should have been selected as a manager in comparison to other candidates that she recommended. If Ms. Johnson was a final decision maker on this latter issue, then her opinion would have been relevant. Ms. Johnson's expertise was limited as to whether Mr. Thomas should have been a candidate, but Mr. Thomas' candidacy for management was not at issue in the trial. Plaintiff's assertions of error in the Court sustaining defendant's objection as to the scope of Ms. Johnson's area of expertise is without merit.

Mixed Motive Instruction

Plaintiff asserts error in the Court's failure to instruct the jury on a "mixed motive" defense. Plaintiff requested instruction was factually unsupported by the evidence. The opening paragraph of plaintiff's requested "mixed motive" instruction read,

> Defendant claims that even if race or color or retaliation were motivating factors in its decision, the Defendant would have taken the same action concerning the plaintiff in the absence of the unlawful motive.

At no time during the course of trial did the defendant claim that "even if race or color or retaliation were a motivating factor in its decision", that the defendant nevertheless would have refused to promote plaintiff into management. The sole defense relied upon by the defendant was that the plaintiff was not qualified or refused to take necessary steps for promotion into management. The defendant did not invoke the "mixed motive defense" and instead argued that race and retaliation were simply not part of its decision making process. By instructing the jury that plaintiff had the burden of proving that defendant was motivated by a racially discriminatory purpose, the Court's instruction conveyed the correct statement of applicable law. Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1366 (10th Cir.1994). See also, Rea v. Martin Marietta Corp., 29 F.3d 1450, 1445-45 (10th Cir.1994).

Plaintiff's reliance on Ostrowski v. Atlanta Mutual Insurance Companies, 968 F.2d 171 (2nd Cir. 1992) to support his allegation of error is misplaced. Ostrowski is clear support for the Court's rejection of plaintiff's proffered instruction. To support a "mixed motive" instruction, plaintiff must produce evidence that race played "a motivating role" in defendant's discriminatory intent. The Court explained:

> For example, purely statistical evidence would not warrant such a charge; nor would evidence merely of the plaintiff's qualification for and the availability of a given position; nor would "stray" remarks in the work place by persons who are not involved in the pertinent decisionmaking process. Those categories of evidence, though they may suffice to present a prima facie case under the framework set forth in McDonnell Douglas Corp. v. Green, (citations omitted) . . .would not suffice, even if credited, to warrant a Price Waterhouse charge.

Ostrowski, 968 F.2d 171, 182 (10th Cir.1992).

As a matter of law, the Court found that the evidence did not support inclusion of plaintiff's proffered "mixed motive" instruction. Plaintiff's allegation of error is without merit.

It is therefore the Order of the Court that plaintiff's motion for new trial is DENIED.

IT IS SO ORDERED this 31st day of June, 1995.

H. DALE COOK
United States District Judge